UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SAN FRANCISCO-OAKLAND NEWSPAPER GUILD, an unincorporated association, Appellant, vs. THE TRIBUNE PUBLISHING CO., a corporation, Appellee.	No. 22385

APPELLANT'S REPLY BRIEF

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That the policy of the federal courts is to exercise a very limited review of arbitrator's awards is not a proposition with which Appellant takes issue. This is the gist of the first thirteen pages of Appellee's argument (Appellee's Brief, pp 4-16) and it misses completely the main thrust of Appellant's brief. Within the limited area of review established by the Supreme Court[1/]

1/ "[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may, of course, look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." United Steelworkers of America v. Enterprise Wheel and Car Co. (1960) 363 U.S. 593,597, 80 S.Ct. 1358.

there exists the responsibility of the Court to see that the arbitrator's decision is based on the collective bargaining agreement between the parties.

Appellee's answer to our analysis of the arbitrator's decision and its infidelity to the collective bargaining agreement is a scant page and a bit (Appellee's Brief, pp 17-18) which sounds as though it is talking about some award other than the one here involved, which appears in the record (R.8 - R.17). It is noteworthy that in the entire section of its brief answering our analysis of the award and the contract (Appellee's Brief, pp 17-18), Appellee does not cite a single page of the award to support its statements of what the award contains.

The award does speak for itself, and it plainly provides that the annual increase is to be paid only if the rate the employee is earning is lower than the $200 which is the top minimum in Art. XX(a) of Contract. The arbitrator wrote:

> "Only the 1965 annual Schedule "D" increase is applicable because this is the only Schedule "D" increase which results in a weekly rate higher than "the schedule of minimums which is contained within this contract," that is, $181.25 is higher than $176.25 but neither $186.25 nor $192.25 is higher than $200. In other words "the schedule of minimums" referred to by Schedule "D" is the entire schedule of minimums contained within Article XX(a) of the contract which includes both the top minimum of $200 for employees with more than 6 years experience as well as the lower minimums for employees with more than 5, 4, 3, 2 and 1 years' experience and less than 1 year's experience." (Award, p.6, R.13)

This is obviously directly contrary to the contract which provides an annual increase to all employees, as of October 16, 1966, of at least $5.00, if his weekly salary is over $160.00 (P.35 of Contract, R.5).

The effect of the arbitrator's award is to re-write the contract by denying the annual increase to all employees earning over $200. Appellee chooses to read the award to support its interpretation - that some employees earning over $200 get the annual increase but not others (Appellee's Brief, p.17). This unilaterally determined gloss of the award does not correct the basic fault in the award - that it modified the agreement between the parties on which the award must be based.

Appellant's detailed analysis of the award and the contract (Opening Brief, pp 7-12) need not be re-peated. Appellee has failed to meet in its brief the points there made. Appellee's sole argument is that this Court may not look at the award to determine whether it draws its essence from the collective bargaining agreement. The Supreme Court has spoken to the contrary, requiring that the Court refuse enforcement of the award where it does not draw its essence from the agreement. (Enterprise Wheel & Car, Supra)

Appellant seeks the upholding of the arbitration process, not the contrary. If an award which is contrary to the explicit terms of the collective bargaining

contract is permitted to stand, the arbitration process will fall into disrepute as a means of settling disputes. This does not require the Court to substitute its own judgment on the merits. The Court need only go so far as to judge the award's fidelity to the agreement.

Dated: June 3, 1968.

DARWIN, ROSENTHAL & LEFF

By _____
Irwin Leff
Attorneys for Appellant

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparatio of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: June 3, 1968
San Francisco, California

_____
Irwin Leff

STATE OF CALIFORNIA)
CITY AND COUNTY OF SAN FRANCISCO) ss

VON AMON LANGMADE, being first duly sworn, upon her oath deposes and says:

I am a citizen of the United States and employed in the City and County of San Francisco; I am over the age of eighteen years and not a party to the within action; my business address is 68 Post Street, San Francisco, California 94104; I served three copies of the attached APPELLANT'S REPLY BRIEF, by placing said copies in an envelope addressed to the following at his office address:

HAROLD W. JEWETT, JR., ESQ.
General Counsel,
Oakland Tribune,
P. O. Box 509
Oakland, California 94604

which said envelope was then sealed and postage fully prepaid thereon, was deposited in the United States mail at San Francisco, California, on the date given below.

Von Amon Langmade
Von Amon Langmade

SUBSCRIBED AND SWORN TO before
me this 12th day of June, 1968

Irwin Leff
IRWIN LEFF, Notary Public
IN AND FOR THE CITY AND COUNTY
OF SAN FRANCISCO, STATE OF CALIFORNIA

My commission expires October 1, 1970